

Kelab Renang Pulau Pinang v Pentadbir Tanah, Daerah Timur Laut, Pulau Pinang & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01-05 OF 2009

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ABU SAMAH, MOHD HISHAMUDIN AND AZIAH ALI JJCA
18 MARCH 2014

Land Law — Right of way — Private right of way — Application for — Land administrator granted second respondent's application — Whether LA had wrongly exercised his discretion and exceeded his jurisdiction in granting private right of way — Whether appellant greatly prejudiced by private right of way granted — Whether second respondent's lot landlocked — Whether LA was in breach of s 392(3) of the National Land Code in failing to make order of compensation when granting private right of way

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Words and Phrases — Landlocked — Meaning of landlocked land — Whether trial judge erred in holding that second respondent's land was landlocked with no access to public road

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Lots 417 and 418 were adjacent lots of land situated alongside Jalan Tanjung Bungah, Pulau Pinang ('the public road'), but Lot 418 did not have direct access to the public road. When the appellant bought Lot 417 it executed a deed of indenture ('the deed') wherein it agreed to provide the owner of Lot 418 a right of way over Lot 417 as access to the public road. The second respondent purchased Lot 418 for purposes of development after being satisfied that it had a right of way over Lot 417 by way of the deed. The second respondent then entered into negotiations with the appellant to construct a road over Lot 417 as access from its land to the public road. The appellant had no objections to the second respondent's proposal but proposed another shorter route and pointed out that under the deed it had the right to determine the position of the right of way. The second respondent disagreed and applied to the land administrator ('the LA'), the first respondent, for a private right of way over Lot 417 based on its initial proposal to the appellant. The LA granted the second respondent's application for a private right of way based on its proposal. The appellant appealed to the High Court against the decision of the LA on, inter alia, the grounds that the private right of way granted by the LA had greatly prejudiced the appellant as it consumed about 1/3 of its land; that Lot 418 was not landlocked as it already had an existing right of way over Lot 417 by virtue of the deed; and that the private right of way granted by the LA was in reality tantamount to granting a public right of way over Lot 417. The High Court found that the LA had not erred in exercising his discretion in

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A granting a private right of way over Lot 417. Hence the present appeal, which was based substantially on similar grounds as submitted by the appellant before the High Court.

Held, allowing the appeal with costs:

- B (1) The LA had wrongly exercised his discretion and exceeded his jurisdiction in granting the second respondent the private right of way over Lot 417. This had greatly prejudiced the appellant. The purpose of a private right of way was to allow the proprietor of landlocked land or persons acting with its express or implied consent to pass and repass between the land and a public terminal only and not for the benefit of any member of the public. It is a stringent requirement that the discretion should be exercised for a proper purpose and where it was wrongly exercised, it became the duty of the courts to intervene. In the present appeal the second respondent's primary intention in applying for the LA's private right of way over Lot 417 was for commercial development of its land and not solely for its own benefit or for the benefit of persons acting with its express or implied consent. Further, the engineering report tendered by the second respondent showed that 60% of Lot 418 was usable for building development and the adverse effect of the right of way on Lot 417 was obvious (see paras 16, 17, 19 & 21–22).
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- F (2) The word 'landlocked' is interpreted as 'fully or almost enclosed by land'. In the present case the engineering report tendered by the second respondent had stated that there was an existing access path to Lot 418 from the public road via Lot 417 except that the path was not tarred and impassable to motor vehicles. It is settled law that where there was an alternative right of way the LA should take that fact into consideration. In the circumstances the trial judge had erred in holding that the second respondent's land was landlocked with no access to the public road (see paras 23 & 25).
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- H (3) On the issue of compensation, the LA was clearly in breach of s 392(3) of the National Land Code ('the NLC') in failing to make an order of compensation when granting the private right of way, to which the appellant was entitled to under s 393(1) of the NLC (see para 27).

[Bahasa Malaysia summary]

I Lot-lot 417 dan 418 adalah lot-lot bersebelahan yang terletak berdekatan dengan Jalan Tanjung Bungah, Pulau Pinang ('jalan awam'), tetapi Lot 418 tidak mempunyai akses terus ke jalan awam. Apabila perayu membeli Lot 417 ia telah melaksanakan hakmilik indentur ('hakmilik') di dalamnya ia bersetuju untuk memberikan pemilik Lot 418 hak laluan atas Lot 417 sebagai akses ke jalan awam. Responden kedua membeli Lot 418 bagi tujuan pembangunan setelah berpuas hati bahawa dia mempunyai hak laluan atas Lot 417 melalui

hakmilik itu. Responden kedua kemudiannya memasuki rundingan-rundingan dengan perayu untuk membuat jalan di atas Lot 417 sebagai akses daripada tanahnya ke jalan awam. Perayu tidak mempunyai bantahan terhadap usulan responden tetapi mengusulkan satu lagi jalan pendek dan menyatakan bahawa di bawah hakmilik itu ia mempunyai hak untuk menentukan kedudukan hak laluan. Responden kedua tidak bersetuju dan memohon kepada pentadbir tanah ('PT'), responden pertama, untuk hak laluan persendirian ke atas Lot 417 berdasarkan usulan awal kepada perayu. PT mengesahkan permohonan responden kedua untuk hak laluan persendirian berdasarkan usulannya itu. Perayu merayu ke Mahkamah Tinggi terhadap keputusan PT, antara lain, alasan-alasan bahawa hak laluan persendirian yang diberikan oleh PT telah sangat merugikan perayu kerana ia mengambil lebih kurang 1/3 tanahnya; bahawa Lot 418 bukanlah tanah yang tidak mempunyai akses ke jalan awam memandangkan ia sudah mempunyai hak laluan atas Lot 417 dengan sebab surat ikatan; dan bahawa hak laluan yang diberikan oleh PT itu pada kenyataannya sama sahaja dengan memberikan hak laluan awam ke atas Lot 417. Mahkamah Tinggi mendapati bahawa PT tidak terkhilaf dalam menggunakan budi bicaranya dalam memberikan hak laluan persendirian ke atas Lot 417. Oleh itu, rayuan ini, yang mana adalah secara ketara berdasarkan alasan-alasan yang sama yang diujahkan oleh perayu di Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos:

- (1) PT telah salah menggunakan budi bicaranya dan melampaui bidang kuasanya dalam memberikan responden kedua hak laluan persendirian ke atas Lot 417. Ini telah amat merugikan perayu. Tujuan hak laluan persendirian adalah untuk membenarkan pemilik tanah yang tidak mempunyai akses ke laluan awam atau orang yang bertindak dengan kebenaran nyata atau tersirat untuk masuk keluar di antara jalan dan terminal awam sahaja dan bukan untuk kegunaan mana-mana orang awam. Ia adalah keperluan yang ketat dan bahawa budi bicara sepatutnya digunakan untuk tujuan wajar dan di mana ia disalahgunakan, ia menjadi tanggungjawab mahkamah untuk campur tangan. Dalam rayuan ini tujuan utama responden kedua memohon kepada PT untuk hak laluan persendirian atas Lot 417 adalah untuk pembangunan komersial tanahnya dan bukan semata-mata untuk kegunaannya sendiri atau untuk kegunaan orang yang bertindak dengan kebenaran nyata atau tersirat. Selanjutnya, laporan kejuruteraan yang ditender oleh responden kedua menunjukkan 60% daripada Lot 418 boleh digunakan untuk untuk membina bangunan dan kesan buruk terhadap hak laluan ke atas Lot 417 adalah jelas (lihat perenggan 16, 17, 19 & 21–22).
- (2) Perkataan 'landlocked' ditafsirkan sebagai 'fully or almost enclosed by land'. Dalam kes ini laporan kejuruteraan yang ditender oleh responden kedua menyatakan bahawa sudah terdapat akses laluan ke Lot 418 dari jalan awam melalui Lot 417 namun laluan itu tidak diturap dan tidak

- A boleh dilalui oleh kenderaan bermotor. Ia adalah undang-undang tetap bahawa terdapat hak laluan alternatif yang sepatutnya dipertimbangkan oleh PT. Dalam keadaan ini hakim perbicaraan telah terkhilaf dalam memutuskan bahawa tanah responden kedua adalah tanah tanpa laluan dengan tiada akses ke jalan awam (lihat perenggan 23 & 25).
- B (3) Untuk isu ganti rugi, PT dengan jelas telah melanggar s 392(3) Kanun Tanah Negara ('KTN') atas kegagalan untuk membuat perintah ganti rugi apabila memberikan hak laluan persendirian, yang mana berhak diterima oleh perayu di bawah s 393(1) KTN (lihat perenggan 27).]

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Cases referred to

Lieow Tow Thong & Ors v Pentadbir Tanah Alor Gajah & Ors [1998] 1 MLJ 79, HC (consd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

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Si Rusa Inn Sdn Bhd & Ors v Collector of Land Revenue Port Dickson & Ors [1987] 1 MLJ 147 (consd)

Legislation referred to

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National Land Code ss 387, 388(2), 389(1), (a), (b), 389(3), 390, 390(1), (2), (3), 393(1), (2), (3)

Derryl Goon (Chik Robyn Choi with him) (Robyn Choi) for the appellant.

Ooi Chooi Gaik (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.

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Ajmer Singh Sandhu (Ajmer Sandhu & Ors) for the second respondent.

Abu Samah JCA:

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[1] The subject matter of this appeal is a private right of way created by the land administrator, ie the first respondent, over the appellant's land held under Grant No 18520 Lot 417 ('Lot 417') in favour of adjacent land held under Grant No 18521, Lot 418 ('Lot 418') owned by the second respondent.

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[2] The site location and topography of both lots are as described in the engineering report (exh OBS3) tendered by the second respondent. Briefly, Lots 417 and 418 are adjacent lots situated alongside Jalan Tanjung Bungah, Pulau Pinang. The northern boundary of both lots face Jalan Tanjung Bungah. The problem with Lot 418 is that it is not at the same level with Jalan Tanjung Bungah. Its boundary alongside Jalan Tanjung Bungah is a steep reinforced granite slope of 6 meters to 13 meters high from the road level, making it very costly to construct an access road from Lot 418 directly to Jalan Tanjung Bungah. The terrain near the southern boundary is also hilly with steep slope. To the south of Lot 418 is a natural jungle without any existing access. In the

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- east-west direction the ground levels increase from 27 meters – 39 meters reduced level (RL) at the western boundary, sloping upwards to 35 meters – 45 meters at the eastern boundary. A
- [3] The second respondent purchased Lot 418 from its previous owner for purposes of development after being satisfied that it had a right of way over Lot 417 by virtue of an indenture dated 28 December 1955. Lot 417 also belonged to the same owner before it was sold to the appellant. B
- [4] When the appellant bought Lot 417 from its previous owner, it executed a deed with the latter by way of the said indenture wherein it agreed to provide a right of way to the owner of Lot 418 or its successors and assigns to ‘construct at their expense a road’ over Lot 417 as access to the public road. It is agreed that such road and its position would be determined, ‘as the purchasers deem suitable’. The purchaser in this content means the appellant. C
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- [5] The second respondent had subsequently applied to the Majlis Perbandaran Pulau Pinang to develop its land into one block of 24-storey condominium complete with parking facilities.
- [6] The second respondent then entered into negotiations with the appellant to construct a road over Lot 417 as access from its land to the public road, namely Jalan Tanjung Bungah. The second respondent proposed a road along the boundary of Lot 417 with Lot 691 (southern boundary) and Lot 4162 (eastern boundary) as shown in the plan marked yellow in Annexure B. The appellant had no objection to the second respondent’s proposal for a right of way over its land but it proposed a shorter route along its northern border running parallel to Jalan Tanjung Bungah as shown in the plan marked green in Annexure A. E
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- [7] The appellant pointed out that under the indenture it has the right to determine the position of the right of way. The area required for the right of way as proposed by the appellant would also be less compared to the second respondent’s proposal which would consume about 1/3 of the appellant’s land. G
- [8] The second respondent disagreed and decided to apply to the land administrator for a *private* right of way over Lot 417 based on a plan similar to what it had earlier proposed to the appellant. H
- [9] On 8 February 2006 the land administrator, after making due enquiry and investigation under s 390(3) of the National Land Code (‘the NLC’) and upon being satisfied that it was expedient to create a private right of way, granted the second respondent’s application for a private right of way based on its proposal. This private right of way granted by the land administrator was 40 I

- A** feet in width, to be constructed along the boundary of Lot 417 with Lot 691 and Lot 4162 covering an area of about 21,732sqft, which is about 1/3 of the appellant's land (see plan marked red in Annexure B). The approved right of way must conform to the specifications set by the Public Works Department.
- B** [10] Being aggrieved by the decision of the land administrator, the appellant appealed to the High Court against the said decision. It was submitted before the High Court that the land administrator had wrongly exercised his discretion and exceeded his jurisdiction in granting the right of way. The private right of way granted by the land administrator had greatly prejudiced the appellant as it consumed about 1/3 of its land. Lot 418 is not 'landlocked' as it already had an existing right of way over Lot 417 by virtue of the said indenture. The private right of way granted by the land administrator was, in reality, tantamount to granting a public right of way over Lot 417 for the convenience of the second respondent who proposed to build a 24 storey condominium complete with parking facilities on Lot 418. It was further submitted that the right of way granted by the land administrator was in contravention of s 393(1) of the NLC as no compensation was given to the appellant for the creation of the private right of way.
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- E** [11] The High Court, in dismissing the appeal by the appellant held, among others, that Lot 418 was landlocked with no direct access to the public road and that the land administrator had not erred in exercising his discretion in granting a private right of way over Lot 417. The learned judge did not agree with the appellant's contention that the private right of way granted by the land administrator was in fact a public right of way because in his view s 389(3) of the NLC provides that a private right of way created for the benefit of the proprietor authorises the proprietor and persons acting with the express or implied consent of the proprietor to pass and repass between the land and public terminal.
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- H** [12] The learned judge however disregarded the appellant's contention that the order of the land administrator contravened s 393(1) of the NLC as no compensation was given to the appellant.
- I** [13] The appeal before us was based substantially on similar grounds as submitted by learned counsel for the appellant before the High Court. After hearing the parties and scrutinising the record of appeal, we allowed the appeal with costs and set aside the order of the High Court in affirming the decision of the land administrator.
- [14] It is not in dispute that the second respondent's application under s 390(1) of the NLC was for a land administrator's private right of way over

Lot 417. Section 389(1) of the NLC states that a land administrator's right of way may be either: **A**

- (a) a private right of way; or
- (b) a public right of way. **B**

A private of way created for the benefit of the state authority or the proprietor or occupier of any alienated land is referred to as a private right of way (s 389(1)(a)). A private right of way created for the benefit of the public is referred to as a public right of way (s 389(1)(b)). **C**

[15] Section 390(3) of the NLC confers upon the land administrator a discretionary power to create a right of way upon receipt of an application and after making due enquiry or investigation under s 390(2) of the NLC, as he thinks appropriate. **D**

[16] It is clear from the order of the land administrator that the right of way over Lot 417 granted to the second respondent was land administrator's private right of way for the benefit of the second respondent and not for the benefit of the public. The right of way for the benefit of the public is known as a public right of way (s 389(1)(b)). The said right of way was not created for the benefit of the state authority. A private right of way for the benefit of the proprietor authorises the proprietor and persons acting with the express or implied consent of the proprietor to pass and repass between the land and a public terminal. Thus, a private right of way created under s 390 of the NLC in favour of the second respondent is not intended for the use or benefit of *any person* other than for the benefit of the proprietor of Lot 418 and those acting with express or implied consent of the said proprietor. Put differently, a private right of way for the benefit of the proprietor is not meant for unrestricted or unimpeded access to any member of the public. That distinguishes the word 'private' from the word 'public'. **E**
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[17] The engineering report tendered by the second respondent shows that only 60% of Lot 418 is usable for building development. The total area of Lot 418 is 62,057sqft. The adverse effect of the right of way on Lot 417 was obvious. The second respondent benefitted at the expense of the owner of Lot 417 as it would be able to maximise that 60% of its usable land for commercial or residential development by constructing a 40 feet width of right of way covering an area of 21,732sqft which is equivalent to 1/3 of the appellant's land. The engineering report states that the 'best route to access Lot 418 is from the entrance at northwest corner of Lot 417 as evidenced by the photographs in Annexure 2. This will be the least disruptive to the usage of Lot 417. It is costly to construct a road from Lot 418 directly to the public road. The report states that: 'It will be very costly to remove the granite/soil-nail **H**
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- A** slope and reconstruct it again. In addition the cost of earthwork will be high and the difficulty of utilising and maximise land usage of Lot 418'. Hence, it recommends that the road access be constructed at the south west corner through Lot 417 as this is the only feasible and realistic access.
- B** [18] Ooi Boon Seng, the director of the second respondent had admitted in his affidavit affirmed on 18 April 2008 that the second respondent had purchased Lot 418 for purposes of development after it had verified that Lot 418 had obtained a right of way over Lot 417 by virtue of the said indenture. He confirmed that the second respondent had applied to Majlis
- C** Perbandaran Pulau Pinang to build a 24-storey condominium with parking facilities on Lot 418.
- D** [19] We are of the view that the second respondent's primary intention in applying for land administrator's private right of way over Lot 417 was for commercial development of its land and not solely for its own benefit or for the benefit of persons acting with its express or implied consent.
- E** [20] The land administrator, in his affidavit in reply stated that it was the right of the land administrator to create a private of right of way and that the topography of Lot 418 bordering Jalan Tanjung Bungah with a steep slope of between 6 and 13 meters high would make it impossible to construct an access road from Lot 418 directly to the public road. The right of way was approved after taking into consideration the requirements of technical departments and
- F** the terms of the indenture which provides that the said road shall be constructed in such manner as are approved by the rural board. The right of way over Lot 417 would also benefit its owner in the event that it proposed to develop its land. The land administrator denied that the right of way would prejudice Lot 417 as it did not involve the acquisition of Lot 417 and that
- G** Lot 417 together with the right of way still belongs to the appellant. What then is the effect of the right of way over Lot 417? Section 388(2) of the NLC makes it clear that the rights conferred and obligations imposed in respect of any land by the creation of a land administrator's right of way shall run with the land and shall be binding on the land's proprietors and occupiers for the time being.
- H** [21] We agreed with learned counsel for the appellant that the land administrator had wrongly exercised his discretion and exceeded his jurisdiction in granting the private right of way of 40 feet in width which occupied about 1/3 of Lot 417. This had greatly prejudiced the appellant. The
- I** primary intention of the second respondent was to maximise the use of its usable land for commercial development. A private right of way under s 390(3) of the NLC in favour of Lot 418 is meant for the benefit of the proprietor of Lot 418 or persons acting with its express or implied consent only. It is not for the benefit of any member of the public. It is a stringent requirement that

discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. Where it is wrongly exercised, it becomes the duty of the courts to intervene (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at p 148, *Si Rusa Inn Sdn Bhd & Ors v Collector of Land Revenue Port Dickson & Ors* [1987] 1 MLJ 147).

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[22] The purpose of private right of way is to allow the proprietor of landlocked land or persons acting with its express or implied consent to pass and repass between the land and a public terminal. A public terminal as defined in s 387 of the NLC means the foreshore, or a river, railway station or public road.

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[23] *Black's Law Dictionary*, (9th Ed), explains the meaning of the word 'landlocked' as:

surrounded by land, with no way to get in or out except by crossing the land of another.

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In *Law Lexicon*, Reprint 1999, the word 'landlocked' is interpreted as 'fully or almost enclosed by land'. In our view the learned judge erred in holding that Lot 418 was landlocked with no access to the public road. The director of the second respondent had in his affidavit acknowledged that Lot 418 had been given a right of way over Lot 417 by virtue of the said indenture. The engineering report states that there is an existing access path to Lot 418 from Jalan Tanjung Bungah via Lot 417 except that the existing path is not a tarred road and impassable to most motor vehicles. The appellant recognised the second respondent's right of access over Lot 417 by reason of the said indenture. It had proposed to the second respondent to construct the access road at the place marked in green in Annexure A, which would occupy a lesser area. But the second respondent wanted to dictate where the access should be.

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[24] The engineering report states clearly that the best route to access Lot 418 is from the entrance at north west corner of Lot 417. This fact, was before the learned judge as well as the land administrator but it was not duly considered. We agreed with learned counsel's contention that cost was in fact a determining factor as to *where* the right of way should be located.

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[25] It is now settled that where there is an alternative right of way the land administrator must take that fact into consideration (*Lieow Tow Thong & Ors v Pentadbir Tanah Alor Gajah & Ors* [1998] 1 MLJ 79; *Si Rusa Inn Sdn Bhd & Ors v Collector of Land Revenue Port Dickson & Ors* [1987] 1 MLJ 147).

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[26] In *Si Rusa Inn & Ors*, the High Court set aside the collector's private right of way granted to the second respondent over the first appellant's land as

A it found that there was an alternative route to the seashore via the public road although the distance was between 1 and 2km from the second respondent’s land. Peh Swee Chin J (as he then was) said that there must be something more than just mere inconvenience or convenience; some situation that partakes of gravity or urgent necessity. On the facts in the instant appeal, it was more

B convenient and less expensive to construct an access road based on the plan as proposed by the second respondent.

C [27] The next ground of appeal is on the issue of compensation. The land administrator was clearly in breach of s 393(2) of the NLC in failing to make an order of compensation when granting the private right of way, to which the appellant was entitled to under s 393(1) of the NLC. This issue was raised before the learned judge but it had not been duly considered. The words used in s 393(1) of the NLC is ‘for the use’ of his land and not ‘for damage suffered’ as in s 393(3) of the NLC. Thus, s 393(1) does not disentitle the appellant for

D compensation for the ‘use’ of his land.

Appeal allowed with costs.

Reported by Kohila Nesan

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